

STATE OF MICHIGAN
COURT OF APPEALS

GREGORY J. BOWENS, PAULA M. BRIDGES,
GARY A. BROWN, ROBERT B. DUNLAP and
PHILLIP A. TALBERT,

UNPUBLISHED
April 19, 2005

Plaintiffs-Appellants,

v

No. 250984
Wayne Circuit Court
LC No. 02-233251-CZ

AFTERMATH ENTERTAINMENT,
AMAZON.COM, INC., AOL TIME WARNER,
PHILIP J. ATWELL, BARNES & NOBLE, INC.,
BARNES & NOBLE.COM, INC., BEST BUY
CO., BLOCKBUSTER, INC., CHRONIC 2001
TOURING, INC., JOHN DOE NUMBER ONE,
JOHN DOE NUMBER TWO, EAGLE ROCK
ENTERTAINMENT, EAGLE VISION, INC.,
GERONIMO FILM PRODUCTIONS, HMV
MEDIA GROUP, HONIGMAN MILLER
SCHWARTZ & COHN, L.L.P., INGRAM
ENTERTAINMENT HOLDINGS, INTERSCOPE
RECORDS, INC., ERVIN JOHNSON, MAGIC
JOHNSON PRODUCTIONS, METROPOLITAN
ENTERTAINMENT, MOVIE GALLERY.COM,
INC., RADIO EVENTS GROUP, INC., RED
DISTRIBUTION, INC., PHIL ROBINSON,
WILLIAM SILVA, TRANS WORLD
ENTERTAINMENT, CORP., KIRDIS TUCKER,
W H SMITH, PLC, HOUSE OF BLUES
CONCERTS, BORDERS GROUP, INC.,
WHEREHOUSE ENTERTAINMENT, MGA,
INC., MTS, INC./TOWER RECORDS, THE
MUSICLAND GROUP, and ANDRE YOUNG,¹

Defendants-Appellees,

¹ Defendant Andre Young will be referred to by his professional name, “Dr. Dre.”

and

CDNOW, INC., CIRCUIT CITY STORES, INC.,
HARMONY HOUSE RECORDS & TAPES, INC.,
HASTINGS ENTERTAINMENT, INC., and
PANAVISION, INC.,

Defendants.

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

This is an appeal from the order granting defendants' motions for summary disposition. We agree with the result and analysis in Judge Meter's opinion, except for its resolution of the eavesdropping claim against the "disclosing defendants," who are not otherwise included within the group of defendants denoted as the "aiding defendants."² In our view, the discovery plaintiffs claim they need on that claim is irrelevant because the disclosing defendants moved for dismissal under MCR 2.116(C)(8). Therefore, we also affirm the dismissal of the eavesdropping claim against these defendants.

A brief comment with respect to why reversal is required on the eavesdropping claim against the aiding defendants. As Judge Meter's opinion indicates, a motion for summary disposition brought under MCR 2.116(C)(10) is premature if the non-moving party shows that further discovery could lead to the disclosure of facts that are material to a substantive issue in the case. See, e.g., *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2003). "However, summary disposition may nevertheless be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position." *Id.* at 25.

Judge Meter correctly concludes that, based upon the footage contained within the DVD, further discovery may reveal relevant, material evidence. As the circuit court noted, the DVD footage "is crucial to this case," but from a review of the cassette submitted to the trial court, it is not at all clear that plaintiffs were aware that the meetings were being taped. Indeed, while at some points in the footage a hand-held video camera appears in a reflection from a mirror, when

² The "disclosing defendants" who are not also a part of the "aiding defendants" are: Eagle Rock, Eagle Vision, Robinson, Red Distribution, AOL Time Warner, Best Buy, Honigman, Ingram, Smith, TransWorld, Wherehouse, MRS/Tower Records, Borders, Circuit City, Musicland, Barnes & Noble, Barnes & Noble.com, Movie Gallery.com, MGA, Harmony House Hastings, Amazon, CDNow, Blockbuster, and Movie Gallery. Although Honigman is also an "aiding defendant," it is a law firm, not a distributor of DVD's or cassettes. Plaintiffs have neither offered any evidence nor asserted any factual allegations that Honigman engaged in any distribution of the DVD's.

plaintiffs are shown, the footage contains characteristics that suggest that the meeting was being secretly taped. For example, at times there are no bright lights as there are when the video camera's presence is clear, and at the same time, the person being taped appears, because of the proximity and height of the recording, to be speaking to an individual who was not holding a video camera. Thus, it is quite possible that the meeting with plaintiffs was secretly taped, yet the other portions of the segment (where plaintiffs were not present) were openly videotaped. Only further discovery, and in particular, a review of any unedited versions of the recordings, will reveal the existence or non-existence of such material facts.

We will also address plaintiffs' claim that the "disclosing defendants" used or divulged information that they knew or reasonably should have known was obtained in violation of MCL 750.539c or MCL 750.539d. See *Blackburne & Brown Mortgage v Ziomek*, 264 Mich App 615, 627; 692 NW2d 388 (2004). The issue was raised by defendants below, and the issue can be addressed as a matter of law because defendants sought dismissal of this allegation under MCR 2.116(C)(8). *Id.*³ Additionally, since the trial court did dismiss the eavesdropping claim against all defendants, we are free to affirm the trial court on the same or different grounds. *Wickings v Arctic Enterprises, Inc.*, 244 Mich App 125, 150; 624 NW2d 197 (2000).

After review of plaintiffs' complaint, it is evident that there are insufficient allegations that these defendants had the requisite knowledge that the conversations were recorded in violation of State law. Indeed, the complaint only contains conclusory assertions, with no factual recitation backing up the allegations. Nowhere in the complaint do plaintiffs provide *any* facts to support the allegation that the disclosing defendants did or should have had a reasonable belief that the video was produced without the consent of some of the participants. Although Michigan is a notice pleading state, plaintiffs still had an obligation to plead some facts showing that there was a viable claim existing at the time the lawsuit was filed. *Butler v Ramco-Gershenson*, 214 Mich App 521, 534; 542 NW2d 912 (1995) ("However, mere conclusions unsupported by allegations of fact, will not suffice to state a cause of action. . . ."), quoting *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 263; 532 NW2d 882 (1995); *Ulrich v Fed Land Bank of St. Paul*, 192 Mich App 194, 197; 480 NW2d 910 (1991). Plaintiffs' complaint contained no such facts, and therefore, should have been dismissed pursuant to MCR 2.116(C)(8), rather than MCR 2.116(C)(10). *Id.*

In light of the foregoing, and the portions of Judge Meter's opinion with which we agree, the trial court's dismissal of all the claims is affirmed, except as to the eavesdropping claim against the aiding defendants. That claim is remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Donald S. Owens

³ Thus, plaintiffs' argument that defendants' motion was deficient because it did not contain admissible evidence in support of its assertions, MCR 2.116(G)(3)(b), is not applicable to this issue.